



July 24, 2025

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

RE: File No. SR-NASDAQ-2025-040; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Equity 7, Sections 114 and 118

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ submits this second comment letter to the Securities and Exchange Commission (the “Commission”) in response to The NASDAQ Stock Market LLC’s (“Nasdaq”) May [xx], 2025 fee filing that replaces earlier placeholder filings establishing new uncapped fees of 0.25% of the total dollar volume for Opening Cross Orders in shares priced below \$1.00 (the “Fee Filing”).² As we stated in our first comment letter regarding Nasdaq’s new fees, the Commission should suspend and ultimately disapprove the Fee Filing because the fees do not meet the exchange fee requirements in the Securities Exchange Act of 1934 (the “Exchange Act”).³ In addition, this is the fourth time (so far) the exchange has amended this filing, which it originally submitted to the Commission on March 3, 2023, even though the new fees Nasdaq established under the Fee Filing have been in place since that date.⁴ The Commission should not allow exchanges to engage in this pattern

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² File No. SR-NASDAQ-2025-040 (May 28, 2025), 90 FR 23582 (June 3, 2025).

³ See Letter from Joseph Corcoran and Gerald O’Hara, SIFMA to Vanessa Countryman, Commission (Mar. 28, 2025), available at <https://www.sec.gov/comments/sr-nasdaq-2025-028/srnasdaq2025028-585415-1689482.pdf>.

⁴ See, Fee Filing, 90 FR at 23582, n. 3 (“The Exchange initially filed this fee proposal as SR–NASDAQ–2025–026 on March 3, 2025. On March 13, 2025, the Exchange withdrew that filing and submitted SR–NASDAQ–028. On May 2, 2025, the Exchange issued an amendment to the filing. On May 9, the Exchange withdrew that filing and submitted SR–NASDAQ–039. On May 19, the Exchange withdrew that filing and submitted this filing.”).

of filing immediately effective rules establishing or amending exchange fees, repeatedly amending or withdrawing those filings and submitting new filings with minimal additional substance, while the new or amended fee stays in place from the date of the initial, deficient filing.

Executive Summary

- Nasdaq has not met its burden to demonstrate the current fee filing complies with the Exchange Act.
- SROs are abusing the immediately effective filing process under Section 19(b)(3) of the Exchange Act.

Nasdaq has not met its burden to demonstrate its fee filing complies with the Exchange Act.

Under the Commission's Rules of Practice, exchanges, as SROs, must file new or amended fees with the Commission, and these filings must show that the fees are consistent with Exchange Act requirements. Specifically, Rule 700(b)(3)(i) of the Commission's Rules of Practice states:

The burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization is on the self-regulatory organization that proposed the rule change. As reflected in the General Instructions to Form 19b-4, the Form is designed to elicit information necessary for the public to provide meaningful comment on the proposed rule change and for the Commission to determine whether the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization. The self-regulatory organization must provide all information elicited by the Form, including the exhibits, and must present the information in a clear and comprehensible manner. In particular, the self-regulatory organization must explain why the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization. A mere assertion that the proposed rule change is consistent with those requirements, or that another self-regulatory organization has a similar rule in place, is not sufficient. Instead, the description of the proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. Any failure of the self-regulatory organization to provide the information elicited by Form 19b-4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization.⁵

As SIFMA pointed out in its initial comment letter, Nasdaq's early filings did not meet the standards set forth under the Commission's Rules of Practice. The same is true for Nasdaq's

⁵ 17 CFR § 201.700(b)(3)(i).

most recent filing. In fact, contrary to the requirements of Rule 700(b)(3)(i), Nasdaq's filing makes general assertions that its proposed rule change is consistent with the Exchange Act and Commission rules and regulations, and it references that other SROs have similar rules in place.⁶

In those areas where Nasdaq's Fee Filing purports to address SIFMA's prior comments or otherwise offer support for the new fees, Nasdaq's explanations are very general and only raise additional questions. For example, Nasdaq's Fee Filing stated:

*In response to the commenter's assertion that the proposed fee will result in substantially higher transaction costs, the Exchange notes that the current fees for securities priced above \$1.00 are based on per share executed and the proposed fee for securities priced below \$1.00 is based on the total dollar volume. Currently, there is not a significant amount of volume of sub-dollar securities traded during the Opening Cross on the Exchange. Therefore, the Exchange believes that using the total dollar volume as the measurement of fees for securities priced below \$1.00 demonstrates the Exchange's efforts to ensure that the proposed fee will not result in substantially higher transaction costs based on current volume for sub-dollar securities.*⁷

Nasdaq's Fee Filing stated that prior to this rule change, executions in the Opening Cross were charged a fee of either \$0.0015 or \$0.0011 per share executed, regardless of the price of the security (i.e., both above and below \$1.00). The new fees for sub-\$1.00 executions in the Opening Cross are now a percent (0.25%) of the total dollar volume of the transaction. Nasdaq did not explain how its general statement, for which it provides no supporting data—that “there is not a significant amount of volume of sub-dollar securities traded during the Opening Cross on the Exchange”—supports its assertion that the new fees based on percentage of dollar volume will not result in substantially higher transaction costs.⁸

Critically, Nasdaq's Fee Filing did not explain why, unlike the prior fees, which were capped at \$35,000 per month for firms that added at least one million shares of

⁶ Fee Filing, 90 FR at 23584 (“[T]he Exchange believes that its proposed amendments [to] Section 118(e) are reasonable, equitable, and not unfairly discriminatory.”); *id.* at 23583 (“The Exchange believes that a separate fee for sub-dollar securities for the Opening Cross aligns with the fee in the Exchange’s fee schedule and competing exchanges for orders executed during Market Hours and the PreMarket Hours and Post-Market Hours, which provides different fees for securities priced above and below \$1.00. Competing equity exchanges offer a similar fee structure to that of the Exchange, including carving out fees for securities priced below \$1.00 and excluding a cap.”).

⁷ Fee Filing, 90 FR at 23584-85.

⁸ Obviously, as the size of the dollar volume of a particular transaction increases, the effect of charging based on dollar volume as opposed to share volume also increases. For example, under the new fee, a 100-share transaction priced at \$0.50 will have a charge of \$0.125 (100 x \$0.50 x 0.25%), while the per-share fees would have been either \$0.11 (100 shares x \$0.0011) or \$0.15 (100 shares x \$0.0015). A 500-share transaction priced at \$0.50 will have a charge of \$0.625 (500 x \$0.50 x 0.25%), while the per share fees would have been either \$0.55 (500 shares x \$0.0011) or \$0.75 (500 shares x \$0.0015).

liquidity (on average per day each month), the new sub-dollar fees are uncapped. Therefore, even if charging the fee based on a percentage of dollar volume “will not result in substantially higher transaction costs based on current volume for sub-dollar securities”—which Nasdaq has not demonstrated—Nasdaq did not address that in the aggregate, the new fee could be substantially higher than the current fee because there is no longer any cap on the fees a member-firm could be charged for sub-dollar executions in the Opening Cross.

Nasdaq’s Fee Filing provided some surface level data apparently intended to counter an argument against its assertion that the new fee is “balanced by the reduced fee and proposed credit provided to sub-dollar securities executed during Pre-Market Hours....”⁹ Again, the information provided is very general and does not give the Commission or commenters enough detail to meaningfully review or comment on it. Specifically, Nasdaq stated:

*A majority (80%) of participants who trade securities priced less than \$1.00 in the Opening Cross also trade sub-dollar securities in the Pre-Market Session. The remaining 20% of participants that only trade sub-dollar securities in the Opening Cross and not in the Pre-Market Session provide a minimal amount (less than 1%) of notional volume of sub-dollar securities in the Opening Cross. Even if these participants continue not to trade sub-dollar securities in the Pre-Market Session, the Exchange believes that the proposed fee is equitable and not unfairly discriminatory because most of the participants if, they maintain similar trading trends, will benefit or see no significant change in fees as a result of the proposal.*¹⁰

These general statements did not provide enough detail to show that the new Opening Cross fees are fair, reasonable, and not unfairly discriminatory. Moreover, there is not enough information to lead to Nasdaq’s suggested conclusion, that the new Opening Cross fees will be “balanced out” by a separate credit for some sub-dollar executions in the Pre-Market. Nasdaq did not explain or give examples to demonstrate how the new credit of 0.05% for liquidity-supplying sub-dollar executions in the Pre-Market Session will impact member firms that are compelled to pay the new 0.25% uncapped fees that apply to all sub-dollar executions in the Opening Cross. It is possible that the new credit will impact some firms if they provide a significant amount of sub-dollar liquidity in the Pre-Market Session and also execute sub-dollar transactions in the Opening Cross. But the filing did not explain these impacts in a way for the public to meaningfully evaluate or comment on them. Nasdaq also did not explain how this significant differential between the Pre-Market credit, which only applies to some sub-dollar

⁹ It appears Nasdaq’s use of the term “reduced fee” in this sentence is a reference to the new fee. However, as discussed, the new fee likely will result in higher, uncapped charges compared to the old fee.

¹⁰ Fee Filing, 90 FR at 23585.

executions, and the Opening Cross fees for all sub-dollar executions will “balance” out the new, uncapped Opening Cross fees.¹¹

SROs are abusing the immediately effective filing process.

As we have noted in previous comment letters, SIFMA members have observed an increase in the number of exchange immediate effective fee filings with the Commission even though the filings provide minimal information to support compliance with Exchange Act fee requirements.¹² The SROs take advantage of the filing and review timelines under the immediately effective rule filing processes in Section 19(b)(3) of the Exchange Act by submitting fee filings that are essentially placeholders that they gradually add to over several months.¹³ The exchanges withdraw (or amend) the original, and one or more subsequent, filings prior to the date by which the Commission may suspend the rule pursuant to Section 19(b)(3)(C) (which is 60 days from the date of the filing with the Commission). The withdrawn filings are replaced by substantially similar filings that purport to add substance or address commenters’ questions. In effect, even when new filings do not add much substance to prior filings, they restart the 60-day deadline for the Commission to suspend the fee change. In the meantime, the fees introduced by the original filing are in place throughout this period.¹⁴

Exchanges often completely change rationales for fees during this process, which demonstrates that the initial filings should have been suspended rather than remaining in place as the fee filings are gradually updated with new rationales every 60 or so days. For example, Nasdaq previously amended one of its filings in this series, and in that amendment asserted that calculating the fees using executed dollar volume instead of executed shares “is equitable and not unfairly discriminatory because there is less fluctuation in notional value traded in the Opening Cross in securities priced less than \$1.00.”¹⁵ Nasdaq did not explain what measures it used to determine there was less fluctuation in sub-dollar notional volume in the Opening Cross. Instead of attempting to explain these details in subsequent filings, Nasdaq abandoned this rationale

¹¹ We note that the new, limited credit of 0.05% is 1/5th the size of the new uncapped fee amount of 0.25%. Therefore, to “balance” the fee credit for certain pre-market executions with the fees charged for Opening Cross executions, a market participant would have to execute five times more liquidity-supplying sub-dollar volume in the pre-market than all of its sub-dollar volume in the Opening Cross.

¹² See SIFMA comment letter, supra n. 3; Letter from SIFMA to SEC re: Nasdaq Markets Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Fees for Connectivity and Co-location Services (Dec. 13, 2024), available at <https://www.sec.gov/comments/sr-nasdaq-2024-067/srnasdaq2024067-547315-1568722.pdf>.

¹³ 15 U.S.C. § 78s(b)(3). The initial filing would not need to be amended if it complied with the Exchange Act in the first instance. For other recent examples of exchange fee filings that were repeatedly submitted, withdrawn, and refiled, see, e.g., Release No. 34-102016, File No. SR-CboeBZX-2024-128 at n. 3 (Dec. 20, 2024); Release No. 34-101690, File No. SR-NASDAQ-2024-067 at n. 3 (Nov. 21, 2024).

¹⁴ We note that the subsequent filings are often confusing as they describe the rule changes as proposals when in fact the fees are already in place. For example, in its current fee filing, Nasdaq uses the future tense—stating that it is “proposing to add new language”—when the rule language and updated fees have been in place since early March.

¹⁵ See, SR-NASDAQ-2025-028 Amendment No. 1 (May 2, 2025).

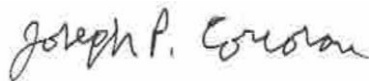
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altogether, yet the new fees have remained in place since March. This type of SRO rulemaking approach is unfair to market participants and inconsistent with Exchange Act requirements.

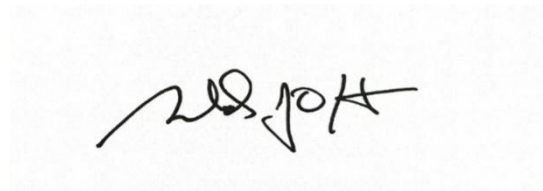
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SIFMA appreciates the opportunity to comment on Nasdaq's fee filing. As discussed above, Nasdaq did not demonstrate that its rule filing to charge a new fee of 0.25% of total dollar volume of executions in sub-\$1.00 stocks in the Nasdaq Opening Cross complies with the Exchange Act. Therefore, the Commission should immediately suspend the rule filing, institute proceedings to review it, and ultimately disapprove it. If you have any questions or need any additional information, please contact please contact Joe Corcoran at (202) 962-7383 or Gerald O'Hara at (202) 962-7343.

Sincerely,



Joseph Corcoran
Managing Director and Associate General
Counsel



Gerald O'Hara
Vice President and Assistant General
Counsel